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CHARLES ELMORE CROPLEY

The Supreme Court of the United States

October Term, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, members of the Tax Commission of the State of Washington, *Appellants,*

vs.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, *Appellees.*

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

BRIEF OF APPELLEES

W. G. GRAVES,
B. H. KIZER,
Attorneys for Appellees.

Office and Postoffice Address:
1224 Old National Bank Building
Spokane, Washington

EMPIRE PRINTING CO., SPOKANE

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FOREWORD

Inasmuch as appellants in their brief refer to appellees as "plaintiffs," and to appellants as "defendants," to avoid confusion we shall follow their example.

Defendants have printed pertinent provisions of the Revenue Act of 1935 containing the 2% retail sales tax and compensating tax as an appendix to their brief. For the convenience of this Court we complete this extract of the act by adding as an appendix to our brief the pertinent rules and regulations of the Tax Commission relating to the compensating tax, and the demand of the Tax Commission for payment thereof served upon plaintiffs, since these aid us in more readily arriving at an understanding of the act.

With these additions to the appendix, plaintiffs' statement of facts in their opening brief is adequate for an initial understanding of the case. The few further facts required for our use can best be introduced, we believe, in the course of the argument.

SUMMARY OF ARGUMENT

The argument of appellees raises a single point: that the questioned tax is an attempt to regulate interstate commerce, and is therefore invalid.

ARGUMENT

I.

The true nature of the questioned tax.

Of one challenging the validity of a state law on the ground that it is repugnant to the commerce clause, we bear in mind that this Court, in the late case of Foster Packing Co. v. Haydel, 278 U. S. 1, 10, has said:

> "It is open to him to show that in their practical operations its provisions directly burden or destroy interstate commerce. Minnesota v. Barber, 136 U. S. 313, 319. Brimmer v. Rebman, 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. Swift & Co. v. U. S., 196 U. S. 375, 398. Lemke v. Farmers Grain Co., 258 U. S. 50, 59, Binderup v. Pathe Exchange, 263 U. S. 291, 309. Shafer v. Farmers Grain Co., 268 U. S. 189, 198, 200."

Hence, this analysis of the declarations of purpose of the legislature and the tax commission of Washington, and of the practical operations of this "compensating tax."

In the first section of Title IV of the "Revenue Act of 1935" of this state, being the title that deals with this compensating tax (Sec. 31, Defts.' Br. 38), the tax appears to have a wide general application. But by subsequent sections, all transactions are exempted from it save only those in interstate commerce that have not paid in the seller state an equivalent sales or use tax. By this device, the legislature avoids

declaring outright that it intends to burden interstate commerce.

But this circuitous method of enactment naturally arouses inquiry as to the real purpose of the act, an inquiry that is largely answered by the act of the legislature in branding the enactment a "compensating tax". To compensate who, and for what? In the sense in which "compensating" is here used, Webster's Dictionary defines the word "compensate" as follows:

> "To make up for; counterbalance; make amends for."

Considering the relation of this compensating tax to the preceding title enacting a retail sales tax in exactly the same amount, it is plain that it is the intent of this "compensating tax" "to make amends for" the burden of the sales tax on domestic sales by placing a like burden on interstate sales. As a tax expressly laid on interstate sales would manifestly be unconstitutional, this so-called "compensating tax" is levied, to rest on the "use" of the personalty the moment the interstate purchase is received.

That this "use tax" is in reality but a thinly disguised sales tax is disclosed by the fact that it is made to rest, by the terms of the act (Sec. 31, p. 38, Dfts.' Br.), not on the use of all personalty, but only on the use of personalty "*purchased* subsequent to April 30th, 1935, the date when this combination sales and compensating tax went into effect. Thus, it is not the act of using, but the fact of purchasing, that gives rise to the tax.

But the defendants, as the Tax Commission of Washington, charged by law with "the administration of this act" (Sec. 208, p. 39, Dfts.' Br.) leave us in no slightest doubt as to the real meaning and purpose of the tax. Immediately after the Act went into effect, the commission formulated and published the following rule:

> "The primary purpose of the compensating tax is to *protect* the merchants of Washington from discrimination arising by reason of the inability of the state, because of the federal constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states." (R. 35: Appendix, this brief.)

In so interpreting the Act, the tax commission only emphasizes the fact that this act is as precisely adapted to that "primary purpose" as are the Federal tariff laws to their design. A compensating tax to protect domestic business from "discrimination" suggests that our national protective tariffs might well be called "compensating tariffs," just as the State's compensating tax with equal truth can be called a "protective tax."

The compensating tax being thus freed of any suspicion that its primary purpose might have been to raise revenue, it is not surprising that the trial judges, in their opinion, declared that

> "* * * it is apparent that the tax is discriminatory in its incidence against articles because of their origin in other states, and that the Washington act was framed for the purpose of suppressing competition from without the state." (R. 29.)

In this declaration they are joined by the three dissenting judges of the Supreme Court of Washington in Vancouver Oil Co. v. Henneford, 183 Wash., 324, 325, where these judges say:

> "Such a law stifles competition and sets up an economic barrier against commerce of other states."

It will be borne in mind that, by the order of the trial judges, their opinion, from which the above quotation is excerpted, was adopted as the findings of fact and conclusions of law of the trial court, under Equity Rule 70-½. (R. 33.)

The weight to be attached to the rules of the tax commission is shown by Section 208 of the act (p. 39, Dfts.' Br.), where the commission is commanded to

> "make and publish rules and regulations, not inconsistent with this act, necessary in enforcing its provisions, which rules and regulations shall have the *same force* and *effect* as if specifically included herein, unless declared invalid by the judgment of a court of record not appealed from."

In the light of this admission that the tax had to take the form of a compensating tax instead of a sales tax "because of the federal constitution," it is not surprising that learned counsel for the defendants cries out in protest (p. 27, Dfts.' Br.) at the use made of this rule by the trial judges, and urges this Court to close its eyes to what the defendants say the statute was intended to accomplish. We therefore inquire: What weight does this Court give to rules and regulations of an administrative agency, charged with the

enforcement of an act and authorized by the act to make such regulations?

> "The regulations were made pursuant to express authority (see § 1309 of the Revenue Act of 1918). They are valid unless unreasonable or inconsistent with the statute. United States v. Grimaud, 220 U. S. 506, 517-518; International Ry. Co. v. Davidson, 257 U. S. 506, 514; They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons. United States v. Moore, 95 U. S. 760, 763; Brewster v. Gage, 280 U. S., 327, 336."
>
> Fawcus Machine Co. v. U. S., 282 U. S., 375, 378.

See also:

U. S. v. Jackson, 280 U. S., 183, 193;
Lucas Amer. Code Co. v. U. S., 280 U. S., 445, 449;
Norwegian Nitrogen Co. v. U. S., 288 U. S., 294, 315;
Federal Land Bank Co. v. Warner, 292 U. S., 53, 55;
Spring City Co. v. Comm., 292 U. S., 182, 189.

But, if the rule making power of the commission were less comprehensive, this rule would still be useful as a ready confirmation of what more labored analysis of the statute itself demonstrates to be the fact. Indeed, counsel for defendants cannot present their own argument without inadvertantly confirming the view of the statute taken both by the tax commission and the trial judges. The burden of defendants' brief is an appeal to this Court to sustain the validity of this compensating tax, else the lack of it will

> "destroy local trade, by granting exemptions and immunities with respect to goods simply because

acquired in interstate commerce." (p. 26, Dfts.' Br.)

This is exactly the contention urged in vain on this Court in the prohibition cases, where it was strenuously urged that if laws prohibiting the sale of liquor imported from other states were held invalid, the enforcement of local laws would be gravely handicapped.

The parallel, in fact, is made particularly sharp by the syllabus of Bowman v. Ry. Co., 125 U. S. 465, where it is said:

> "A State cannot, for the purpose of protecting its people from the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the assent of Congress, express or implied, is first obtained."

So here. The State of Washington cannot, for the purpose of protecting its merchants from the evils of competition enact laws that burden, and are intended to burden, interstate commerce, without the assent of Congress.

The fallacy of the excuse offered by counsel for this tax that it avoids discrimination in favor of sister-state merchants is disclosed by counsel in another part of their argument. At p. 15 of their brief, counsel contend that the compensating tax is "in effect a tax imposed, partially at least, in lieu of property taxes." Pointing to the 40-mill property tax limit law of Washington, they assert that this reduction of property taxes "made it necessary" to enact the sales tax law.

Exactly so. The sister-state of Oregon has no such property tax limit, and it also has a net income tax law, but no sales tax. Thus the merchant in Oregon pays on his stock of merchandise far heavier property taxes than his Washington competitor, and a net income tax of which his Washington competitor is wholly free. Then, when his goods move into Washington in interstate commerce, his sale, through this compensating tax, must make a further contribution of 2% to help defray Washington taxes. This is what counsel smoothly called "avoiding discrimination" by the compensating tax.

But who compensates the Oregon merchant for these heavier burdens of his own state's property and income taxes, when he seeks to do business with his Washington competitor on an equal footing? Viewed in this light, the compensating tax is in reality a preference of the local merchant at the expense of his interstate competitor.

We conclude our examination of the true nature of the compensating tax by suggesting the following test.

If we lay the compensating tax side by side with the State's sales tax, we shall see that they are "identical twins," born of one germ cell.

Each applies only to tangible personalty sold subsequent to the date of the Act.

Each is measured by the price paid for the goods by the buyer.

Each uses the same percentage of the price to compute the tax.

If applied to interstate goods, the lien of each would attach at the same time. If the questioned tax had been enacted as a sales tax, it could not be levied or collected until the interstate personalty reached the State and was delivered to the buyer. Under the rule of the Tax Commission, that is also the exact moment when the compensating tax becomes payable. (Rule of Tax Com., Appendix, this Brief.)

In short, every characteristic of the sales tax is exactly duplicated in the compensating tax, so that the tax commission is more than justified when it declares in its rule that "taken together, (they) provide a uniform tax."

If it be true that there is no difference whatever between the two taxes save only in the names given them by the statute, then it must follow that the compensating tax *is* a sales tax, and this Court is required to consider and deal with it as such.

II.

The Questioned Tax Amounts to a Regulation of Interstate Commerce

1. The power of Congress to regulate commerce between the states is exclusive and plenary, and is not subject to any state restrictions, burdens or limitations.

Gibbons v. Ogden, 9 Wheat., 1, 193;
Bd. of Trustees of Univ. of Ill. v. U. S., 289 U. S., 48, 57.

2. Interstate commerce is not confined to transportation from one state to another, but comprehends all

commercial intercourse between different states and all the component parts of that intercourse.

Dahnke-Walker M. Co. v. Bondurant, 257 U. S., 282, 290;
Lemke v. Farmers Grain Co., 258 U. S., 50;
Shafer v. Farmers Grain Co., 268 U. S., 189;
Foster Packing Co. v. Haydel, 278 U. S., 1, 10.

3. The interstate commerce clause of the Federal Constitution protects such commerce, even after it has entered the state, from any burdens imposed by reason of its foreign origin.

Welten v. Missouri, 91 U. S., 275, 282;
Darnell v. Memphis, 208 U. S., 113, 125;
Baldwin v. Seelig, 294 U. S., 511, 526.

4. No state, through the exercise of the taxing or police powers, may establish an economic barrier between the states.

State Freight Tax Cases, 15 Wall., 276;
Baldwin v. Seelig, 294 U. S., 511, 527.

5. Interstate commerce cannot be taxed at all by the state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

Robbins v. Shelby Taxing Dist., 120 U. S., 489, 497;
State Freight Tax Cases, 15 Wall., 276;
Caldwell v. North Carolina, 187 U. S., 622, 625.

6. The attempt here to justify the questioned tax by pointing to the accompanying sales tax, levied on

domestic sales, does not justify the burden on interstate commerce.

> Bowman v. Chicago Ry. Co., 125 U. S., 465, 496;
> Minnesota v. Barber, 136 U. S., 313, 326;
> Crew-Levick Co. v. Pennsylvania, 245 U. S., 292, 297.

7. Although a statute may not be avowedly or in terms directed against the flow of interstate commerce into a state, if its necessary effect is to burden or obstruct commerce with other states, it is invalid.

> Minnesota v. Barber, 136 U. S., 313, 326;
> Foster Packing Co. v. Haydel, 278 U. S., 1, 10.

8. Of all the cases cited above, Baldwin v. Seelig, supra, bears the closest resemblance to this case, not only upon the facts but the legislative intent behind the facts. In the case at bar, the tax commission in its rule says (R. 35; See Appendix this Brief):

> "Thus these two methods of taxation (sales tax and compensating tax) stand as complements to each other in the state revenue plan, and, taken together provide *a uniform tax* * * *."

The commission had previously pointed out in an earlier portion of this same rule that the compensating tax had been levied

> "* * * by reason of the inability of the State, because of the Federal Constitution, to impose a burden upon sales made to residents of this State by competitive merchants in other states."

The tax commission thus announces the State's success in circumventing the Federal Constitution by

enacting a compensating tax on interstate sales in lieu of the forbidden sales tax that so exactly accomplishes the desired purpose that the two taxes can be "taken together" and called "a uniform tax." In so doing the State celebrates its success in accomplishing by a slight indirection what it could not have done directly.

In Baldwin v. Seelig, supra, New York enacted legislation to control the price to the producer for local milk. Being unable to extend its price-fixing policy directly to milk imported from a sister state, it had to resort to police power to halt the milk's sale, once it had "come to rest" in the state unless this minimum price had been paid. Thus, it, too, had to do by indirection what it could not do directly. This case's answer meets both devices with equal felicity.

> "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

9. The attempts of both legislatures to do by indirection what they could not do directly reminds us

that this Court in Fairbanks v. U. S., 181 U. S., 294, affirmed

> "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result."

See also:

> Macallen v. Mass., 279 U. S., 620, 629;
> Western Union Telegraph Co. v. Foster, 247 U. S., 105, 114;
> Miller v. Milwaukee, 272 U. S., 713.

10. Since it is manifest that the questioned tax is occasioned by Washington's fear that its sales tax on domestic sales might stimulate interstate transactions, the following further language from Baldwin v. Seelig, supra, is made particularly applicable:

> "We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' * * * If New York, in order to promote the economic welfare of her merchants may guard them against the competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

III.

Is the Questioned Tax a Revenue Measure?

The rule of the tax commission that "The primary purpose of the Compensating Tax is to protect the merchants of Washington from discrimination * * by competitive merchants in other States" has another

important consequence. Viewing its primary purpose as protection, therefore not revenue, raises the question whether it can be justified as a revenue measure. In Board of Trustees of the University of Illinois v. United States, 289 U. S. 48, the University challenged the right of the United States to collect an import tax on scientific instruments imported by it under the Tariff Act of 1922. That Act was entitled—"An Act to provide revenue, to regulate commerce with foreign countries," etc. We quote from the opinion at p. 57:

> "Appellant argues that the Tariff Act is a revenue measure; * * * that the duty is a tax, that the Act is not one for the regulation of commerce but is an exertion of the taxing power, and that, as such, it is subject to the constitutional limitation that the Congress may not lay a tax so as to impose a direct burden upon an instrumentality of a State used in the performance of a governmental function."

But this Court held that, since the primary purpose of the Act was to regulate foreign trade rather than to raise revenue, the power to lay the tax must be referred to the commerce clause, and that the revenue resulting from the duties was but an incident to such exercise of the power.

There is, we acknowledge, a distinction between the questioned tax and the Tariff Act, in that the interpretation of the State tax is promulgated by its tax commission, and is not borne at the masthead of the act, in its title, as in the Tariff Act. But is not this a distinction without a difference? Out of its wide experience with revenue laws, this Court is no doubt

aware that a general revenue act such as this one, with its highly technical and involved provisions, comprising more than 200 sections and occupying 150 pages of the State's laws, does not assemble itself at the behest of the legislatively untrained farmers, realtors, clerks and mechanics who meet for a 60 day legislative session every two years, but in its principal outlines at least is the work of the tax experts and lawyers who comprise the staff of the State's tax commission. With especial assurance may we rely on this as the fact when we are confronted with such a legal innovation as this compensating tax, disclosing so plainly the shaping hand of the tax expert who comprehensively plans for all contingencies.

It is this authorship, evidently, that provides for the sweeping rule and regulation-making power of the commission that we find in this Act. And we infer that it is the experience of this Court with tax laws that has induced the Court, in Fawcuss Mach. Co. v. U. S., 282 U. S. 375, 378 and other recent decisions, to give especial weight to the interpretation of tax laws by those charged with their administration.

We are, then, confronted with an authoritative and official interpretation of the tax by the group who best understand it. It being avowed by the defendants that the primary purpose of the compensating tax is to protect Washington merchants, the questioned tax cannot be sustained under the taxing power of the State, but must seek its justification in whatever power the State has to regulate interstate commerce. Having none, the tax must fail.

IV.

Principal Contentions on Behalf of the State

Both the majority opinion of the Supreme Court of Washington in Vancouver Oil Co. v. Henneford, 183 Wash., 317, and the dissenting trial judge assume that the compensating tax, when considered with the sales tax results in no discrimination against interstate commerce. With that assumption in mind, they then take the position that the tax does not apply until after the interstate shipment of goods "comes to rest within the state and is being held for use or sale."

1. No Discrimination?

The assertion that there is no discrimination in allowing the questioned tax to rest upon interstate commerce immediately on its arrival in this state, is based on an unexamined and erroneous assumption. That assumption is that unless the precise sales tax in the full amount levied by Washington has been levied in the state of origin, its merchants enjoy an advantage in interstate trade that Washington may neutralize by taxing the goods on arrival. The fact that the vendor of these goods must pay, in one form or another, his full share of taxes in his own state for the privilege of doing business, whether he pays by a sales tax or by other taxes, is not allowed to weigh. His transaction must nevertheless bear this additional burden of the Washington tax. Thus Washington, without inquiry into the facts, becomes the ex parte judge of whether that other State is levying the full equivalent of Washington taxes on its citizens and

their transactions. And because this State deems that the state of the origin of the goods is not levying such heavy taxes as we do, it claims the paramount right to tax the products of interstate shipment immediately on their arrival, so as to "compensate" its merchants and secure protection for them against what it deems to be undue competition.

The tax systems of no two states are alike. If each state is allowed thus to "offset," as the attorney general of the State puts it, the supposed advantage other states enjoy by reason of lower taxation in one bracket, without taking into account the heavier taxation of the competing states in other brackets, what is to be the end of this race to "avoid discrimination"?

The answer is manifest. It is for this Court once more to declare that no state may take its own measures to "protect" its citizens from the competition of interstate trade, whether arising through supposed inequality of taxation or for any other reason.

2. Have the Interstate Shipments "Come to Rest"?

Bearing in mind that the questioned tax is confined strictly to property sold and is in reality but a sales tax wearing the thin disguise of a use tax, we note that its author made not the slightest effort to postpone its application until the original package of the interstate shipment is broken, or until the goods are mingled with the general mass of goods in the State. Added to this, the tax commission empowered by the statute to make rules that shall "have the same force and effect as if specifically included" in the Act, by its demand on these plaintiffs (R. 34) de-

fined the tax as to be applied whenever there is any

> "exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving or installing or performing any act by which dominion or control over the property is assumed by the purchaser."

Reduced to concrete example, this plainly means that the moment the interstate carrier delivers the personalty to the consignee, that moment the use tax applies. At that moment, the consignee is "keeping" or "moving" the property, he is "performing an act by which dominion of control over the property is assumed by the purchaser."

It will not do to say that these precise words are not found in the statute. One who moves property or who performs any act by which he assumes dominion or control over it is manifestly using it. At the least, there is no inconsistency between the tax commission's construction of the statute and its terminology.

We remark also that the legislature of Washington did not indulge even in the subterfuge of New York in the legislation that gave rise to Baldwin v. Seelig, supra, by declaring that the tax should apply only when the goods involved in interstate shipment had "come to rest," or when the goods had become "a subject of regulation by the State." It was too eager to affect interstate shipments by its tax to wait for a moment after the consignee had laid his hands on the interstate shipment.

The State takes it for granted that this Court will assume that the questioned tax is necessary to avoid discrimination. Then it is expected to assume, in the teeth of the wording of the statute and the construction placed on it by the tax commission, that the goods do come to rest in Washington, do become mingled with the mass of property in the State before the tax applies. And, finally, the appeal is made to this Court to assume, by doing equal violence to the letter and spirit of the Act, that the tax itself is merely a part of the property taxation of the state, instead of being a part of its sales tax legislation, designed to burden interstate sales of goods.

V.

Sundry Contentions of Defendants' Counsel

1. Is the questioned tax a property tax?

Counsel, at pp. 12-14 of their brief, urge this Court to disregard the holding of the Supreme Court of Washington in Vancouver Oil Co. v. Henneford, 183 Wash., 317, that this tax is an excise tax, which would also require the Court to ignore the legislative declaration that it is "a tax or excise for the privilege of using" tangible personalty. (Sec. 31, Dfts.' Br., p. 38.) In so urging, particularly in quoting from Eastern Air Transport Inc. v. So. Car. Tax Comm., 52 F. (2d), 457, counsel apparently further contend that this use tax is to be considered by the Court as a property tax.

Such a position is untenable under Billings v. U. S.,

232 U. S., 261, 279, where this Court, in analyzing the nature of a typical use tax, said:

> "It is certain that the tax levied by the provision was intended to be an excise tax upon 'the use of every foreign-built yacht, pleasure boat or vessel * * *.'"

And again, in Bromley v. McCaughn, 280 U. S., 124, 136, where this Court said:

> "* * * this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property * * * is an excise * * *." (Citing many authorities.)

2. Is the questioned tax a "lieu" tax?

Counsel, at p. 15 of their brief, contend that the "compensating tax may be viewed as a property tax" because, as they aver, it was imposed in part in lieu of general property taxes. This Court will readily recall that the cases relied on by counsel, such as Pullman Co. v. Richardson, 261 U. S., 330, go no farther than to hold valid a tax explicitly declared to be a property tax but measured by gross receipts of a carrier, although the gross receipts included returns from interstate as well as local business. The Court noted that its validity as a property tax was further supported by the statutory declaration that the particular tax was levied in lieu of all other property taxes on such carrier.

We might well grant that the general property 40-mill tax limitation of the State curtailed the State's revenues, and that the sales and compensating taxes

were later levied, in part, to supply this newly felt need. But this mere historical connection between one legislative reduction of taxation and the later increase of taxation is so far from the narrowly restricted doctrine of "lieu" taxation that it calls for no answer other than the specific statement of the holding of these carrier cases.

3. Does the questioned tax rest also on intrastate transactions?

Counsel are concerned because the questioned tax is in reality levied only against goods that move in interstate commerce. They seek to meet that reality by denying its absolute and literal truth. At page 22 of their brief, counsel say that the use tax might apply within the State

> "to casual and isolated sales and sales of bread, fresh fruit and vegetables and dairy products consumed off the premises."

Nonsense! It is too plain for argument that the legislature did not intend to contradict its exemption of basic foods from the sales tax by levying a "use" tax. Counsel themselves avow at page 8 of their brief that the sales tax and the compensating tax are complementary and thus to be construed in harmony with each other. To picture the tax collector who is forbidden to collect a sales tax, in the act of trying to catch the consumer of an apple, or a pint of milk, or a loaf of bread, between the time of purchasing and the time of eating in order to collect a 2% "use" tax is too absurd. This is a mere quibble, and as a quibble we dismiss it.

4. If the Governor of Washington had vetoed the sales tax then what?

In the dissenting opinion in the trial court, the exclusively interstate character of the tax is sought to be minimized by the suggestion that the use tax *might* have been extended to domestic personalty, had the governor of the State vetoed the sales tax while letting the use tax stand. And this argument is reiterated by counsel in their brief. (pp. 22-3.) It should be sufficient to answer that such possibility is all but incredible, when we consider the grave distortion of legislative will that must have resulted from so capricious an action. Furthermore, the governor did nothing of the sort, and it is now too late to gain any assistance from a discussion of the predicament either of the State or the taxpayer in such an event.

But a more conclusive answer is found in Dahnke-Walker Co. v. Bondurant, 257 U. S., at p. 292, where a more probable hypothesis was advanced.

> "The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it was also improbable. * * * The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort."

Or, as Mr. Justice Holmes remarked in United Fuel Gas Co. v. Hallinan, 257 U. S., at page 281:

> "* * * theoretical possibilities may be left out of account."

5. Can Baldwin v. Seelig be distinguished?

At page 25 of their brief, counsel for defendants repeat the error of the majority of the Supreme Court of Washington in seeking to distinguish Baldwin v. Seelig, supra, by declaring that "There, the milk had not come to rest within the state at the time of the bottling * * *."

We need hardly remind the Court that such a statement flies in the face of the New York statute which declared that the act was to be deemed to apply whenever the

> "milk produced outside of the State becomes a subject of regulation by the State, in the exercise of its police powers * * *. After any such milk so produced shall have *come to rest* within the State * * *," etc.

It was no doubt this cunning attempt to delay the regulation until the milk should have, technically speaking, "come to rest" that caused this Court to quote approvingly from Sonneborn v. Cureton, 262 U. S., at page 516, the following:

> "'A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State.'"

Emphasizing this thought still further this Court continued:

> "Neither the power to tax nor the police power may be used by the state of destination, with the

aim and effect of establishing an economic barrier against competition * * *."

6. Is the Act's offset of sales taxes paid in sister-states useless?

At page 28 of their brief, counsel contend that the offset for sales taxes provided by the Act is inapplicable to goods brought into this State, because no such taxes would be paid in other states. All such purchases, counsel contends, would be interstate.

The common, every day fact, known of all men, is quite to the contrary. As a single instance, take the case of motor cars and motor trucks, of which plaintiff buys and uses a great many. Sales are frequently consummated in a sister state, and the new car or truck brought into the State, to save railway transportation charges. Another example is furnished by Eastern Air Transport v. Tax Com., 285 U. S., 147, 152, where this Court held a sales tax good, although the merchandise bought was to be used in interstate commerce, and chiefly beyond the confines of the taxing state in which a non-resident purchaser bought it. Furthermore, many sales taxes may be levied and collected on transactions in advance of the final transaction constituting interstate commerce. Thus considered, the trial judges were entirely correct in taking at their face value the words of the Act that exempted from the tax, all personalty that had "already been subjected" to a sales or use tax under the laws "of some other state of the United States."

VI.

Conclusion

In Second Employers' Liability Cases, 223 U. S., 1, 47, this Court, in defining what is a regulation of interstate commerce, has said that:

> " 'to regulate' in the sense intended is to foster, protect, control, restrain."

The latter half of this definition, to "control and restrain" interstate commerce, fits precisely the manifest purpose of this tax. The State's legislature avows it by creating it as, and calling it, a compensating tax. The State's tax commission avows it by declaring that the primary purpose of the tax is to protect the merchants of Washington. And the State's attorney general avows it by admitting that the tax is enacted as an "off-set" to "avoid discrimination." In view of this settled agreement by all branches of the State government charged with the enactment, interpretation and enforcement of the tax, we are assured that this Court will express its assent to the conclusion thus reached by declaring that as an attempt to control and restrain interstate commerce, the questioned tax is invalid.

W. G. GRAVES,
B. H. KIZER,
Attorneys for Respondents.

APPENDIX

PERTINENT RULES AND REGULATIONS OF TAX COMMISSION OF WASHINGTON RESPECTING COMPENSATING TAX. (R. 34-5.)

Under the authority of Section 208 of Chapter 180, Session Laws of Washington 1935, the defendants, acting as the Tax Commission of the state of Washington, have on October 16, 1935, issued sundry rules and regulations relating to various taxes provided by the act and their collection. Respecting Title IV such rules and regulations (fol. 42) provide among other things as follows:

> "Statement of the Nature of the Tax.—The Compensating Tax (Title IV) was enacted to supplement the Retail Sales Tax by imposing a like tax for privilege of using within this state tangible personal property purchased at retail subsequent to April 30, 1935 (the effective date of the Retail Sales Tax law) and in respect to which property neither a sales tax nor a use tax equal to 2% has been imposed by this or any other state.
>
> "The primary purpose of the Compensating Tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the Federal Constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states.
>
> "In general, the Compensating Tax applies upon the use of any property, the sale of which would have been subject to the Washington sales tax had it been purchased within the state. Conversely, it does not apply upon the use of any property, the sale of which has been subjected to the Washington sales tax. Thus, these two

methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon either the sale or use of all tangible personal property, irrespective of where it may have been purchased."

DEMAND OF TAX COMMISSION MADE UPON APPELLEES. (R. 33-4.)

"Mason-Walsh-Atkinson-Kier Company,
Mason City,
Washington.
Gentlemen:

We have been advised that during the months of May and June, 1935, the Mason-Walsh-Atkinson-Kier Company purchased at retail and used within the State of Washington various and sundry articles of tangible personal property, the sale or use of which had not theretofore been subjected to the payment of any tax by the state of Washington or by any other state, the total purchase price of which amounted to $899,390.91, exclusive of transportation costs. We have also been advised that transportation costs in connection with said purchases for said two months period amounted to $21,798.43.

We hereby make formal demand that you pay to the tax commission of the state of Washington on or before May 1, 1936, the sum of $18,423.78, the same being compensating tax at the rate of 2% due and payable to the state upon the amounts above set forth under the provision of Title IV, Chapter 180, Laws of 1935.

Demand is also hereby made upon you for payment on or before May 1, 1936, of a like tax upon all articles or tangible personal property purchased at retail between the dates July 1, 1935, and February 29, 1936, inclusive, and used by you in the state of Washington, the sale or use of which had not, prior to your purchase thereof, been subjected to a tax by this or any other state equal to 2% of the purchase price thereof.

You are advised that tax liability under Title IV, chapter 180, Laws of 1935, arises at the time tangible personal property is put to use within the state of Washington. Such property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term 'made available for use' means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.

In the event that the foregoing demand is not complied with on or before the date specified, we shall be compelled to take the proper steps for the recovery of the full amount of taxes due.

Very truly yours,

TAX COMMISSION OF THE STATE WASHINGTON,

EWA:K By T. M. JENNER, Commissioner."

SUPREME COURT OF THE UNITED STATES.

No. 418.—October Term, 1936.

Harold H. Henneford, et al., Appellants, *vs.* Silas Mason Company, Inc., et al., Appellees. } Appeal from the District Court of the United States for the Eastern District of Washington.

[March 29, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A statute of Washington taxing the use of chattels in that state is assailed in this suit as a violation of the commerce clause (Constitution of the United States, Article I, § 8) in so far as the tax is applicable to chattels purchased in another state and used in Washington thereafter.

Plaintiffs (appellees in this court) are engaged either as contractors or as subcontractors in the construction of the Grand Coulee Dam on the Columbia River. In the performance of that work they have brought into the state of Washington machinery, materials and supplies, such as locomotives, cars, conveyors, pumps, and trestle steel, which were bought at retail in other states. The cost of all the articles with transportation expenses added was $921,189.34. Defendants, the Tax Commission of Washington (appellants in this court) gave notice that plaintiffs had become subject through the use of this property to a tax of $18,423.78, two per cent of the cost, and made demand for payment. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), adjudged the statute void upon its face, and granted an interlocutory injunction, one judge dissenting. 15 F. Supp. 958. The case is here upon appeal. 28 U. S. C. § 380.

Chapter 180 of the Laws of Washington for the year 1935, consisting of twenty titles, lays a multitude of excise taxes on occupations and activities. Only two of these taxes are important for the purposes of the case at hand, the "tax on retail sales", imposed by Title III, and the "compensating tax", imposed by Title IV

on the privilege of use. Title III provides that after May 1, 1935, every retail sale in Washington, with a few enumerated exceptions,[1] shall be subject to a tax of 2% of the selling price. Title IV, with the heading "compensating tax", provides (§§ 31, 35) that there shall be collected from every person in the state "a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935", at the rate of 2% of the purchase price, including in such price the cost of transportation from the place where the article was purchased. If those provisions stood alone, they would mean that retail buyers within the state would have to pay a double tax, 2% upon the sale and 2% upon the use. Relief from such a burden is provided in another section (§ 32) which qualifies the use tax by allowing four exceptions. Only two of these exceptions (b and c) call for mention at this time.[2] Subdivision (b) provides that the use tax shall not be laid unless the property has been bought at retail. Subdivision (c) provides that the tax shall not apply to the "use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States." If the rate of such other tax is less than 2%, the exemption is not to be complete (§ 33),

[1] "Sec. 19. The tax hereby levied shall not apply to the following sales:
"(a) Casual and isolated sales by a person who is not engaged in the business of selling tangible personal property at retail;
"(b) Sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under title V of this act, when the gross proceeds from such sales must be included in the measure of the tax imposed under said title V;
"(c) The distribution and news stand sale of newspapers;
"(d) Sales which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;
"(e) Sales of motor vehicle fuel taxable under chapter 58 of the Laws of 1933, section 5 (being Rem. Rev. Stat., section 8327-5);
"(f) Sales made on relief vouchers issued by the department of public welfare or by any county or city or other welfare agency;
"(g) Sales of fresh sweet milk, raw unprocessed fruits and vegetables, butter, eggs, cheese, canned milk and unsweetened bread in loaf form (including rolls and buns), sold for consumption off the premises."

[2] For greater certainty exceptions (a) and (d) are stated in this note:
"The provisions of this title shall not apply:
"(a) In respect to the use of any article of tangible personal property brought into the State of Washington by a non-resident thereof for his or her use or enjoyment while within the state;
"(d) In respect to the use of tangible personal property purchased during any calendar month, the total purchase price of which is less than twenty ($20.00) dollars."

but in such circumstances the rate is to be measured by the difference.

The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

1. The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 453; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 575; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519; *Woodruff* v. *Parham*, 8 Wall. 123, 137. This is so, indeed, though they are still in the original packages. *Sonneborn Bros.* v. *Curston*, 262 U. S. 506; *American Steel & Wire Co.* v. *Speed, supra; Woodruff* v. *Parham, supra.* For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or